SYARIKAT PEMBINAAN BINAKEN

v.

PERBADANAN PEMBANGUNAN BANDAR

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-04-25-1998]
23 MARCH 2001

ARBITRATION: *Award - Remission - Second award did not include costs and interest incurred by appellant in first arbitration proceedings - Whether appellant should have applied to court for a provision thereof before remission*

CIVIL PROCEDURE: *Appeal - Appeal against second arbitration award - Second award did not include costs and interest incurred by appellant in first arbitration proceedings - Whether appellant should have applied to court for a provision thereof before remission - Grounds of appeal advanced - Whether would lead to an interference by appellate court on arbitrator's findings of fact*

In the High Court, the appellant had applied to set aside an award made by the arbitrator in favour of the respondent. The application succeeded. An appeal to the Supreme Court by the respondent against that decision of the High Court failed and the case was remitted to the arbitrator. A second arbitrator was appointed to act and determine the dispute as the first arbitrator declined to act. The second arbitrator found for the appellant on all the principal issues but awarded the respondent liquidated and ascertained damages for a small period of delay on the part of the appellant. He also did not award costs and interest incurred by the appellant in the first arbitration proceedings. The appellant then sought to remit the second award to the High Court and the application was refused. Hence, the present appeal.

Held:
Per Gopal Sri Ram JCA

[1] The appellant should have asked the court in the application to set aside the first award to make provision for the costs and expenses of the first arbitration. There would have been no difficulty in obtaining a consequential direction from the court. Since the appellant did not choose to adopt that course, it was the author of its own misfortune in which it now found itself.

[2] With regard to interest, that was a matter within the discretion of the arbitrator and he decided to exercise his discretion not to award interest.

[3] The liquidated and ascertained damages were granted by the arbitrator to the respondent based on facts as found by him. In his award, he had fully examined the reasons for the delay and had only found against the appellant for a small period of delay.

[4] In this instance the court was asked to act on appeal, a function that was clearly not available under the Arbitration Act 1952. All the grounds relied upon by the appellant to challenge the second award were in reality an invitation to interfere with the findings of fact made by the arbitrator. The court declined the invitation based upon the state of the authorities.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Di Mahkamah Tinggi, perayu telah memohon untuk mengenepikan award yang dibuat oleh penimbangtara bagi pihak penentang. Permohonan tersebut berjaya. Rayuan kepada Mahkamah Agung oleh penentang menentang keputusan Mahkamah Tinggi tersebut gagal dan kes tersebut diremitkan kepada penimbangtara. Penimbangtara kedua telah dilantik untuk bertindak dan menentukan perbalahan tersebut oleh kerana penimbangtara pertama tidak mahu bertindak. Penimbangtara kedua telah berpihak kepada perayu bagi semua isu-isu prinsipal tetapi mengawardkan penentang ganti rugi jumlah tertentu dan ganti rugi yang ditentukan bagi kelengahan masa yang tidak lama oleh perayu. Beliau juga tidak mengawardkan kos dan faedah yang di tanggung oleh perayu di dalam prosiding timbangtara yang pertama. Perayu kemudian memohon untuk meremitkan award kedua ke Mahkamah Tinggi dan permohonan tersebut ditolak. Maka, rayuan ini.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Perayu sepatutnya memohon kepada mahkamah di dalam permohonan mengenepikan award pertama untuk membuat peruntukan bagi kos dan perbelanjaan timbangtara pertama. Tidak akan timbul masalah bagi mendapat arahan berikutnya daripada mahkamah. Oleh kerana perayu tidak berbuat demikian, nasib malang yang di alaminya sekarang adalah akibat kesilapannya sendiri.

[2] Berkenaan faedah, perkara tersebut berada dalam budibucara penimbangtara dan beliau telah memutuskan untuk tidak mengawardkan faedah.

[3] Ganti rugi jumlah tertentu dan ganti rugi yang ditentukan telah diberikan oleh penimbangtara kepada penentang berdasarkan fakta-fakta yang didapatinya. Dalam award beliau, beliau telah meneliti dengan sepenuhnya sebab-sebab kelengahan tersebut dan hanya mendapati terhadap perayu kelengahan yang tidak lama.

[4] Dalam perkara ini, mahkamah diminta untuk bertindak dalam rayuan, suatu fungsi yang tidak terdapat di bawah Akta Timbangtara 1952. Kesemua asas yang digunapakai oleh perayu untuk mencabar award kedua sebenarnya mempelawa mahkamah untuk campurtangan atas perkara yang telah ditentukan oleh penimbangtara. Mahkamah menolak pelawaan tersebut berdasarkan autoriti-autoriti yang sedia ada.

[Rayuan ditolak.]

Case(s) referred to:
Gillespie Bros v. Thompson Bros [1923] LI LR 519 ***(foll)***
Hartela Contractors Ltd v. Hartecon JV Sdn Bhd [1999] 2 CLJ 788 ***(foll)***

For the appellant - Matthias Chang (PC Neoh); M/s Suhaimi Khor Zulkifli & Chang
For the respondent - Zainur Zakaria (Ramli Khan); M/s Zainur Zakaria & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R3-25-42-1997]

Reported by Raja Vishnu

JUDGMENT

Gopal Sri Ram JCA:

This is a tolerably plain case. It concerns an arbitration. It does not involve any important question of law. The history of the present litigation has been set out *in extenso* by the learned judge in the judgment appealed from. It may be summarised as follows.

The appellant and respondent are parties to a written construction contract. Disputes arose between the parties and these were referred to arbitration ("the first arbitration"). The arbitrator in the first arbitration made an interim award. The appellant was unhappy with the first award. It applied to the High Court to set aside the first award for misconduct. It succeeded. The first award was set aside. An appeal to the Supreme Court against the High Court's decision failed. The Supreme Court remitted the matter back to the first arbitrator. But he declined to act. So a second arbitrator was appointed to act in his place and determine the dispute. The second arbitrator published his award. He found for the appellant on all of the principal issues. But he awarded liquidated and ascertained damages against the appellant for a small period of delay. He did not award the costs incurred by the appellant in the first arbitration

proceedings. Neither did he award the appellant interest. The appellant then sought to remit the award. The learned High Court judge who heard the application refused it. The appellant then appealed to us to reverse the judge.

Counsel for the appellant argued that the arbitrator had penalised his client by refusing interest, costs and expenses. It was said that the appellant having succeeded in setting aside the first award, it was entitled to the costs and expenses of the first arbitration. The appellant had therefore been wrongly deprived of these as well as the interest. We agree with counsel for the respondent that there is a short answer to this complaint. It is that the appellant should have asked the court in the application to set aside the first award to make provision for the costs and expenses of the first arbitration. There would have been no difficulty in obtaining a consequential direction from the court. Since the appellant did not choose to adopt that course, it is the author of the misfortune in which it now finds itself. It is true that the second arbitrator says that he did not wish to know about the first award. He has given his reasons for it. He says that he wanted to act independently and with fairness. In other words, he did not want his judgment to be tainted with the findings made in the first arbitration. We can detect no error in this. With regard to interest, this is a matter within the discretion of the arbitrator and he as it happens has decided to exercise his discretion by deciding not to award interest.

So far as the liquidated and ascertained damages are concerned, these were granted by the arbitrator to the respondent based on the facts as found by him. In his award, the arbitrator has fully examined the reasons for the delay in the performance of the contract. He found that much of the delay was not the responsibility of the appellant. As we earlier said, he only found against the appellant for a small period.

We agree with counsel for the respondent that this is a case in which the court is being asked to act in appeal, a function that is clearly not available under the Arbitration Act 1952. Encik Zainur Zakaria for the respondent drew our attention to an authority directly in point.

In *Gillespie Bros. v. Thompson Bros.* [1923] L1. LR 519, 524, Atkin LJ said:

> The arbitrators nevertheless have come to the conclusion what did take place on this inspection amounted to a sufficient representation by the sellers that the buyers were not to rely on or treat these certificates as being certificates relating to this particular cargo. Once they come to that conclusion we cannot interfere. It is no ground for coming to a conclusion on an award that the facts are wrongly found. The facts have got to be treated at found; and on their finding that there was no such representation, the result in favour of the sellers

> seems to me to follow. Nor is it a ground for setting wide an award that the conclusion is wrong in fact. Nor is it even a ground for setting aside an award that there is to evidence on which the facts could be found, because that, would be mere error in law, and it is not misconduct to come to a wrong conclusion in law and would be no ground for ruling aside the award union the error in law appeared on the face of it. Looking at the two awards it is impossible to say there is error in law on the face of them, because there in evidence which would justify the arbitrators in coming to the conclusion that what happened did not amount to a representation.

Our courts adopt the same approach. See, *Hartela Contractors Ltd. v. Hartecon JV Sdn. Bhd.* [1999] 2 CLJ 788.

All the grounds relied on by the appellant to challenge the second award are in reality an invitation to interfere with the findings of fact made by the arbitrator. We must decline the invitation based upon the state of the authorities.

Finally, we must say in fairness to the arbitrator that although the contact sum here is comparatively small – it is about RM310,000 – the award runs into some 200 pages. The arbitrator has considered every point taken by the appellant. The learned judge expressed his satisfaction that there had been no misconduct. He was undoubtedly right.

The appeal was accordingly dismissed and those orders made that usually follow a dismissal.